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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE.

Respondents.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This brief *amicus curiae* in support of the petition of New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited), is filed by the Chamber of Commerce of the United States, with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce, and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests, before the courts, the U. S. Congress, the Executive Branch and independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The questions presented in the instant case are of vital concern to the Chamber and its members. Essentially, the case presents the question whether states may in-

[1] E.g., *Buffalo Forge* v. *Steelworkers*, 428 U.S. 397 (1976); *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.*, 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.*, 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron Inc.*, 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board*, 490 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971); *N.L.R.B.* v. *The Boeing Company, et al.*, 91 S.Ct. 1952 (1973).

trude upon the national labor policy of government neutrality in labor disputes and the process of collective bargaining, by granting unemployment compensation benefits to strikers at the expense of their struck employer. Inherent in that question is the broader issue of whether, under the Supremacy Clause of the United States Constitution and the doctrine of pre-emption, as enunciated by this Court, states may compel an employer to financially assist a strike by his own employees, and thus tip the delicate economic balance so essential to effective collective bargaining and the resolution of labor disputes. Moreover, Chamber members contribute a very significant portion of the monies which constitute the Unemployment Insurance Funds of the various states. The Chamber, therefore, has a vital and continuing interest in the outcome of this litigation.

The Chamber's interest in the questions presented by the petition of New York Telephone Company is further evidenced by its intervention in *Grinnell Corporation* v. *Hackett*, 475 F.2d 449 (1st Cir., 1973), cert. den. 414 U.S. 858 (1973), and in *Hawaiian Telephone Company* v. *State of Hawaii, Dept. of Labor & Indus. Rel.*, 378 F. Supp. 791 (D. Hawaii, 1974), 405 F. Supp. 275 (D. Hawaii, 1975).[2] The decision of the Second Circuit in this case stands in direct conflict with that of the First Circuit in *Grinnell*, where the Court found that Congressional intent was ambiguous. Should that conflict per-

[2] Hawaiian Telephone Company, the Chamber of Commerce of the United States and the Chamber of Commerce of Hawaii have filed a joint petition concurrently with the petition in the instant case, requesting that a writ of certiorari issue in advance of the judgment of the Court of Appeals for the Ninth Circuit in *Hawaiian Telephone*, as the issues are essentially the same. (Docket No. 77-962). We are advised that Grinnell Corp. has sought a rehearing of this Court's previous denial of certiorari.

sist, unemployment compensation benefits to strikers could be an unconstitutional intrusion upon the federal labor policy in some states, but not in others. Thus, Chamber members and other employers would be compelled to support strikes by their employees in some states, but in other states, employers would be permitted the full play of economic forces Congress intended to allow in labor disputes.

Accordingly, the Chamber submits this brief *amicus curiae* in support of the petition for writ of certiorari filed by petitioners herein.

REASONS FOR GRANTING THE WRIT

I

The Second Circuit decision creates a conflict between circuits and is contrary to congressional and judicial pronouncements prohibiting state action except where expressly permitted or consistent with the federal scheme.

The decision of the Second Circuit in *New York Telephone Company, et al* v. *New York State Department of Labor, et al.*, —— F.2d —— (No. 77-7337, Nov. 9, 1977) 96 LRRM 2921, is in direct conflict with that of the First Circuit in *Grinnell Corporation, supra,* and Supreme Court decisions on labor law pre-emption. It completely ignores the former and violates the latter.

The Second Circuit held in *New York Telephone,* that the New York statute permitting payment of unemployment compensation to strikers after an eight-week period was a permissible, rather than pre-empted, exercise of state authority. It acknowledged a conflict between the

New York statute and "the broad federal policy of free collective bargaining", but said "the conflict is one which Congress has decided to tolerate.", 96 LRRM 2926. Earlier, the First Circuit in *Grinnell Corp.* v. *Hackett, supra,* examined the same ground, but found no clear evidence of Congressional intent on the subject. 475 F.2d 454, 457. The answer to the question of intent is, of course, dispositive of the pre-emption issue and thus determinative of whether states may burden the bargaining process by transferring dollars from the struck employer to his striking employees.

After a certain amount of judicial probing in earlier Supreme Court decisions, there developed a recognition by the Court of the several distinct branches of the pre-emption doctrine and the appropriate tests applicable to each. *Lodge 76, IAM* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976). If conduct is neither expressly prohibited nor protected by the National Labor Relations Act, 61 Stat. 136 et seq., 29 USC 151 et seq., the question is raised whether "Congress has occupied the field and closed it to State regulation". *Teamsters Local 20* v. *Morton,* 377 U.S. 252, 258 (1964). More specifically, did Congress intend that the questioned conduct be free of regulation because it was "to be controlled by the free-play of economic forces"? *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

The starting point in determining the pre-emptive reach of the NLRA is Congressional intent as to that statute, not other statutes[3] and not the failure of Congress to speak on the issue here involved. Moreover, by its ex-

[3] Not only does the Second Circuit improperly focus on other statutes rather than the NLRA but in the process inexplicably downplays the District of Columbia statute where Congress has clearly declared strikers disqualified for unemployment compensation.

press reservation of the labor law pre-emption issue in *Ohio Bureau of Employment Services* v. *Hodory*, 45 U.S. L.W. 4544 (No. 75-1707), n. 3,[4] this Court indicated that inquiry into social benefit legislation is not necessarily an answer to the labor law pre-emption question that must be treated when properly invoked. Accordingly, analysis of the NLRA is our task.

The NLRA and its amendments reflect a basic principle of governmental neutrality in the operation of that Act. Section 7 recognizes the right of employees to organize and bargain and also the right to refrain therefrom. 29 U.S.C. 157. These co-equal rights were first expressed in the 1947 amendments when Congress reworked the statute to restore balance.[5] If employees elect to organize, collective bargaining is the prescribed method of dispute resolution, but again in 1947 Congress made clear its views on the process. It was offended by a pattern of NLRB intrusion into the substantive aspects of the bargaining process and so defined the term as to remove this form of governmental interference, 29 U.S.C. 158(d).[6] On the other hand,

[4] The Supreme Court there considered only the pre-emptive effect of the Social Security Act and the Federal Unemployment Tax Act; it expressly declined to consider the pre-emptive effect of the National Labor Relations Act.

[5] "A Committee amendment assures that when the law states that employees are to have the rights guaranteed in §7, the Board will be prevented from compelling employees to exercise such rights against their will, as it has consistently done in the past. In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so." I Leg. Hist. of the Labor-Management Relations Act 1947 at 318.

[6] "By reason of a number of decisions of the Board, which in effect required an employer to make or offer concessions to show that he was bargaining in good faith, the House definition proposed an objective test for determining what constituted bargaining collectively." I Leg. Hist. of the Labor-Management Relations Act 1947 at 538.

it specifically *permitted state interference* with the collective bargaining process to the extent that compulsory union membership—the economic lifeblood of unions and an otherwise required subject of bargaining—could be barred by state action. 29 U.S.C. 164(b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

With this singular exception, expressed unequivocally by Congress, the substantive aspects of permissible bargaining are beyond government reach. *H. K. Porter* v. *NLRB*, 397 U.S. 99 (1970).

Even though the substantive aspects of bargaining are left to the parties, Congress has demonstrated that the bargaining relationship is not to be subverted for purposes never intended. In response to its concern that legal services be more readily available to employees, Congress in 1973 expanded the permissible area of bargaining to include a jointly administered trust fund for defraying costs of legal services for employees. Concern was expressed, however, by Senator Taft and others, that employer contributions not be used to finance "offensive legal actions bearing directly on labor-management relations."[7] Accordingly, legal services paid by the trust fund may not be furnished to initiate any proceeding against the em-

[7] "Specifically, such funds should not only be prohibited from use for litigation, but also from counselling and legal advice with respect to disputes or proceedings in the labor-management context." S.Rep. No. 93-139, 93d Cong., 1st Sess. (1973), U.S. Code Cong. & Admin. News 2007, 2010.

ployer or the union. 29 U.S.C. 186(c)(8). Thus, Congress was willing to open up this area to bargaining and to permit, by agreement, the creation of such a benefit fund only on the condition that the employer would not be victimized, in state or federal court actions, by his own contributions.

Where Congress has not clearly spoken, this Court has exercised a vigilant oversight regarding state and federal action which tended to or did jeopardize free collective bargaining. In a series of decisions this Court has stayed the hand of government in order to preserve balance and the legitimate role of self-help. *NLRB* v. *Brown,* 380 U.S. 378 (1965) freed multi-employer associations from the artificial restraints theretofore imposed by the NLRB and permitted them to lockout and hire temporary replacements when one of the member-employers was struck. Similarly, *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965) freed the single employer from those same restraints and permitted the lockout as a device to bring about a settlement of a labor dispute. *NLRB* v. *Mackay Radio,* 304 U.S. 375 (1938) affirmed the employer's right to continue operations and to hire permanent replacements for economic strikers. *Beasley* v. *Food Fair, Inc.,* 416 U.S. 653 (1974) pre-empted a state court damage action and recognized an employer's right to fire his supervisors because of union activity, as being consistent with the purposes of the Act and the legitimate needs of the employer.

Unions have likewise benefited from this same vigilance. *Teamsters Local 20* v. *Morton, supra,* pre-empted an employer's state court damage action for loss of business resulting from non-coercive union appeals to a secondary employer. *NLRB* v. *Insurance Agents' Union,* 361 U.S. 477 (1960) removed the restraint placed by the NLRB on the union weapon of partial strike. *Lodge 76, IAM, supra,*

precluded the state from enjoining partial strikes. *Florida Power & Light Co.* v. *IBEW Local 641,* 417 U.S. 790 (1974) permitted unions to discipline supervisor-members who crossed a lawful picket line to perform struck work.

The evolution of the role of self-help and the recognition of the need for neutrality is dramatically demonstated by this Court's contrary pre-emption decisions in two cases presenting similar facts, *International Union, UAW Local 232* v. *Wisconsin Employment Relations Board* (*Briggs-Stratton*), 336 U.S. 245 (1949) and *Lodge 76, IAM, supra. Briggs-Stratton* held permissible, as not pre-empted by federal labor policy, state action enjoining concerted employee interference with the employer's production process. The Court reasoned that "Congress designedly left open an area for state control" and it found no evidence that Congress had "clearly manifested an exclusion of the state power sought to be exercised in this case". 336 U.S. 253. Twenty-seven years later, with no expression heard from Congress, the Court in *Lodge 76, IAM* held pre-empted state action enjoining a concerted employee refusal to work overtime. The Court said "There is simply no question that the Act's processes would be frustrated . . . were the State's ruling permitted to stand." The Court found it ". . . clear beyond question that Wisconsin '[entered] into the substantive aspects of the bargaining process to an extent the Congress has not countenanced' [citing *NLRB* v. *Insurance Agents,* 361 U.S. at 495]". 96 Supreme Court 2557.

The overruling of *Briggs-Stratton* was based on subsequent judicial insight that federal labor policy required, and was intended by Congress to have, an area free of federal and state regulation, where self-help alone was the regulator. Congressional tolerance of *Briggs-Stratton* obviously was not a factor in the *Lodge 76, IAM* analysis.

Congressional tolerance of the New York statute is equally non-persuasive and represents an improper analysis under *Lodge 76, IAM.*

The Second Circuit, in *New York Telephone,* made only the most fleeting reference to "the otherwise broad pre-emptive scope of the federal labor laws" before concluding that pre-emption did not apply, notwithstanding the finding of conflict between state statute and federal policy. The conflict stems from the District Court findings, not disturbed on appeal, that the expectation or receipt of substantial, weekly, tax-free payments to strikers is a substantial factor in the decision to initiate a strike or in the maintenance of it, and that such payments cause an employer to finance his own striking employees.[8] 434 F. Supp. 813-814, 824.

Given the fact of conflict, the claim of pre-emption may not be cavalierly dismissed in light of Congressional and judicial concern for the integrity of free collective bargaining. This concern has found expression in numerous decisions of this Court. *Farmer* v. *Carpenters, Local 25* makes clear that state action must be "consistent with effective administration of the federal scheme", —— U.S. ——, 97 S.Ct. 1056, 1063 (1977). *Garner* v. *Teamsters Local 776,* often quoted by this Court, with approval, declares:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.", 346 U.S. 485, 500 (1953).

[8] Unemployment compensation is derived solely from an excise tax on wages. This is so whether payment is made under a state program, under the federal-state extended benefit program, or under a temporary, emergency federal program. *Hearings on Unemployment Compensation Benefits Before the Subcommittee on Unemployment Compensation of the House Committee on Ways and Means,* 94th Cong., 1st Sess., Phase I, 62-63, 327-329 (1975).

Insurance Agents, supra, quotes, with approval, from the pre Taft-Hartley Senate Report as follows:

> "Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace. S. Rep. No. 573, 74th Cong., 1st Sess., p. 12." 361 U.S. 484.

In the case *sub judice* it is the employer's right to withstand strike pressure and engage in economic battle that is undermined when unemployment compensation is paid to strikers. Moreover, the struck employer is required to fund the very economic weapon used by the union. This is the antithesis of self-help. It is a forced transfer of help from one combatant to another which simultaneously weakens the former's ability to engage in the very process which Congress has prescribed for settlement of the ultimate impasse.

Inappropriate NLRB action was struck down in the *Insurance Agents* case and as Justice Brennan therein observed:

> "Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S.Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." 361 U.S. 490.

Similarly, no state can properly act through its Unemployment Compensation Law to equalize or tamper with disparities of bargaining power between employer and union. Finally, as so aptly set forth in the concurring opinion of Justice Powell in *Lodge 76, IAM, supra*:

> ". . . the Wisconsin law, as applied in this case, is pre-empted since it directly curtails the self-help capability of the union and its members, resulting in a significant shift in the balance of free economic bargaining power struck by Congress." 96 S.Ct. 2560.

Patently, the payment of unemployment compensation benefits to strikers "curtails the self-help capability" of the employer and results in a "significant shift in the balance of free economic bargaining power struck by Congress".

II

State freedom to compensate strikers threatens national labor policy on a broad front.

The State of New York regards an eight-week disqualification of strikers as the measure of state neutrality in labor disputes affecting interstate and intrastate commerce. *New York Telephone, supra,* n. 5. In Rhode Island, the measure is seven weeks. If state legislative judgment is predominant, there is no obstacle to concluding that a more accurate measure of neutrality is a five-week, three-week, or one-week disqualification for strikers, as well as for those locked out. Most states presently consider that a benefit of one-half the average weekly wage is a justifiable level of compensation in terms of the program's social objectives. But these states are free to increase that ratio, just as the states are free to increase the taxable wage base. Puerto Rico, for example, levies its tax on 100% of the wages paid, rather than on the first $6,000 dollars of wages, which is the base observed by most states.[9]

Accordingly, a lower disqualification period and higher benefit would more easily crush employer resistance. Unions and strikers could declare open season on an employer's checkbook, one way or the other, through higher settlements or longer strikes. A perfect 'heads I win—tails you lose' situation.

The risk of further undermining federal labor policy is all too apparent where strikers can receive benefits despite their disregard or violation of federal labor law.[10] The Act does not require the NLRB to seek injunctive relief for every unlawful strike, only those reasonably thought by the Board to involve unlawful secondary or recognitional objectives. Given the Board's reluctance to use its discretionary authority to enjoin other unlawful conduct,[11] a union strike in support of an unlawful bargaining demand can be maintained for an extended time before Board adjudication.

Thus, despite disregard for federal law and illegal activity on the part of strikers, the victim of this conduct, the employer, can be forced *solely because of state law* to

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[9] *Hearings on Unemployment Compensation Benefits, supra,* 54.

[10] Witness the fact that the strike in the New York Telephone matter was indeed found to be an illegal strike under federal labor law, 208 NLRB 267 (1974).

[11] Exercised on only 25 occasions in fiscal 1976, 41st Annual Report of NLRB, 255.

finance its perpetration. Fair play and reasonable rules to regulate commerce are meaningless if this is permitted. In reality, such laws will provoke constant strife, not peace, disobedience, not respect for the law.

CONCLUSION

The pre-emption concepts enunciated by this Court require its review of the Second Circuit decision. Otherwise, that doctrine, which has been so thoughtfully developed by this Court in its different aspects, will experience significant erosion, all to the detriment of a national policy it was designed to protect.

Respectfully submitted,

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